MAY 1 19
HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1955.

No. 914

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

FORREST BOECKER,
WAYNE C. SMITH, JR.,
RAYMOND FORDER BUCKLEY,
110 South Central,
Clayton 5, Missouri,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	2
Jurisdiction	2
Questions presented	3
Questions	4
Statement	5
Basis of opinion of the United States Court of Appeals.	8
Reasons for granting writ	9
Prayer	10
Summary of argument	11
Argument	12
In sustaining respondents' motion for a directed verdict where the evidence is conflicting and would support different inferences, the Court of Appeals for the Eighth Circuit has usurped the function of the jury and brings its decision into conflict with controlling decisions of this Court...	12
The opinion of the Court of Appeals for the Eighth Circuit erroneously injects contributory negligence as a defense in this case, contrary to the provisions of the Federal Employers' Liability Act....	14
The Court erred in excluding from the case evidence that would tend to establish that ice in the locking mechanism of the air hose would cause it to burst apart under pressure, and this evidence should be considered in determining if the petitioner made a submissible case	15

The opinion of the Court of Appeals, which is the subject of this petition, is in conflict with that Court's prior opinion in this case reported in 200 F. (2d) 893 16

Conclusion 17

Cases Cited.

Barnett v. T. R. R. A., 200 F. 2d 893 (8th Cir.) 11

Lavender v. Kurn, 327 U. S. 645 ..... 9, 11, 12

Teal v. Bilby, 123 U. S. 572 ..... 10, 11

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29 ..... 9, 11

Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 87 L. Ed. 446 ..... 11, 15

Wilkinson v. Livingston, 45 F. (2d) 465 (8th Cir.) ... 10, 11

Wilkerson v. McCarthy, 336 U. S. 53 ..... 9, 11, 13

Statutes Cited.

Federal Employers' Liability Act, 45 U. S. C. A., Section 51 ..... 1, 2, 3, 5, 10, 11, 15

Title 28, U. S. Code, Section 1254 (1) 2

SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1955.

No. .....

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Justices of the United States:

Your petitioner, Ferriel M. Barnett, respectfully petitions for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the Eighth Circuit, affirming the action of the District Court in directing a verdict in favor of the respondent and against petitioner, in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51.

OPINION BELOW.

The opinion of the U. S. Court of Appeals for the Eighth Circuit is reported in Ferriel M. Barnett v. Terminal Railroad Association of St. Louis, a corporation (not yet officially reported). A copy of the opinion begins on page 16 of the Appendix hereto.

An earlier opinion of the same court on a prior appeal of the same case will be found on page 27 of the Appendix hereto. That opinion was reported at 200 F. (2d) 893.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Section 51), for damages for personal injuries to petitioner while working as a car inspector and car repairman in St. Louis, Mo., at the yards of respondent, a rail carrier subject to said Act. The case was tried for the third time before Division 1 of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and at the close of all the evidence, respondent filed its motion for directed verdict which was deferred by the court and the case was sent to the jury. Upon failure of the jury to agree, they were discharged. Thereafter respondent made a motion for judgment in accordance with its motion for directed verdict. The District Court granted said motion and entered judgment dismissing petitioner's complaint on its merits. Thereafter, petitioner appealed to the United States Court of Appeals, and that Court affirmed the action of the District Court in dismissing petitioner's complaint on its merits, holding that there was no showing of negligence on the part of respondent. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1). The judgment of the United States Court

of Appeals was entered on the 17th day of January, 1956, and petitioner's motion for rehearing was denied and the mandate of that Court was then filed on the 16th day of March, 1956.

QUESTIONS PRESENTED.

Petitioner brought suit under the Federal Employers' Liability Act, Section 51, alleging that he was employed by respondent as a car inspector and car repairman, and that he was injured as a result of the negligence of respondent in that respondent allowed and permitted an air brake hose and the steam pipe on each of two cars to remain uncoupled and in a position where steam was escaping from the steam pipe while the weather was freezing, thus causing ice to form in and upon the couplers of the air hose and petitioner was unable to make a secure coupling of the air hose and they were caused to break apart, thus and thereby causing injury to petitioner.

Respondent denied that it was negligent.

Petitioner offered evidence showing the presence of ice on the coupler in question; that he knocked it off with a hammer and on coming back he saw steam escaping from the steam hose line and attempted to tighten the connection by hitting on the clamps with a hammer. That while he was so engaged the air hose coupling broke and struck him. Petitioner contended that this did not constitute a safe place to work because of failure to couple the lines when the cars were set out. Respondent offered evidence that there was no ice on the coupler as petitioner had removed it and that the ice did not cause the coupler to come apart.

The jury being unable to agree, the district court entered judgment in favor of defendant and dismissed petitioner's complaint on the merits. The United States Court of Appeals affirmed this action of the district court.

QUESTIONS.

1. Where the evidence shows a conflict in the testimony and two juries of reasonable men have failed to agree on the issue of negligence, may a district court or an appellate court make a finding of fact and inject its own finding into the case as the only reasonable finding that could be made by a jury?

2. Where one of the issues in the cause is whether or not a particular coupling mechanism may appear to be secure, but is not secure because of the presence of a foreign material (ice) in the coupling mechanism, is it proper for the trial court to withdraw from the jury demonstrative evidence, consisting of a similar type coupler, to demonstrate that the accident could have happened as plaintiff contends, that is that the presence of a foreign substance in the air hose coupling creates the hidden danger of a violent separation, as on the occasion of petitioner's injury?

3. Is it proper for a District Court to enter a judgment dismissing plaintiff's complaint on the merits where different and conflicting inferences are possible from the evidence and one of those inferences entitles plaintiff to recover?

4. May the trial or appellate court inject contributory negligence as a complete defense in a Federal Employers' Liability Act case by ruling, in effect, that even though defendant railroad was at fault in permitting an unsafe condition as petitioner charged, it was petitioner's duty to correct that condition so as to render it his own sole fault if he is hurt because of the existence of that unsafe condition?

5. May an appellate court or a district court disregard the law of a case as established in a former appeal of that same case?

STATEMENT.

Petitioner brought this action in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri under the Federal Employers' Liability Act, 45 U. S. C. A., Section 51.

Respondent's answer was a denial of negligence on its part.

The cause was tried three times. The first trial resulted in a hung jury. At the second trial the trial judge sustained Respondent's motion for a directed verdict at the close of petitioner's case. Petitioner appealed and the Court of Appeals for the Eighth Circuit reversed the trial court, remanding the case for another trial. On the occasion of the third trial, at the close of all of the evidence, Respondent moved for a directed verdict in its favor. The cause was submitted to the jury and upon their failure to agree they were discharged. Thereafter the District Court, on renewal of Respondent's motion for a directed verdict on June 3, 1955, entered judgment for the Respondent on the merits.

Petitioner appealed to the United States Court of Appeals and that Court affirmed the judgment.

The evidence showed, and the United States Court of Appeals found, the following facts:

On December 29, 1950, petitioner was in the employ of respondent as a car repairman and inspector. His duties included servicing the Wabash Railroad Company's passenger train "Bluebird" as part of the services furnished by respondent to the Wabash. Usually the Wabash Bluebird consisted of six cars but on the night in question an extra car had been cut in between the last two regular cars, then cut out of the train at the end of the run before

Petitioner came on duty. The regular cars were left coupled as to draft couplings, but the steam and air hose connections were left uncoupled. Usually the steam hose and air hose connections would be recoupled in such a situation. In fact, there was a company rule requiring steam to be kept on all equipment during cold weather, and it was cold on the occasion in question. All of the air and steam hose connections were connected except those between two cars mentioned, these being cars No. 1601 and No. 51. The air hose connection of No. 51 had a lump of ice on the coupler larger than a man's fist. Petitioner knocked this ice off with a hammer, but he could not be sure that he removed all of the ice, since he had only a hand battery lantern to work by, and there was no other light. The steam hose connection also had ice on it. This ice was caused by condensation of steam escaping from the open steam line. Petitioner made the couplings and continued on with checking the cars. He thought he had removed all of the ice because he was able to make the coupling. He blocked each car and when he got to the westernmost edge of the train he turned on the steam connection in the yard. On returning towards the eastern end of the train, he saw steam escaping between cars 1601 and 51, and hit on the steam hose connection to tighten it. This would be proper procedure. The defendant (respondent) offered some evidence that this might cause an otherwise secure coupling to break. While hitting the steam hose connection, the air hose connection broke, striking plaintiff and injuring him.

Two exhibits were offered of a coupling such as the one in use on the occasion in question. The respondent also offered in evidence certain statements bearing petitioner's signature and initials. Petitioner did not remember signing these statements. These statements conflicted in some particulars as to how this accident occurred. Respondent had offered evidence that a coupling properly made could

not come apart as petitioner stated, or if it did that it would do so because of being hit. There is also some testimony that a coupling could not be made if there was any foreign material in the coupling unit. The original exhibits of the couplings were marked with an "A" to indicate the air hose line and an "S" to indicate the steam hose line. Much of this testimony was given by a Mr. McCauley. This witness was recalled by petitioner and the following occurred (by Mr. Fredrickson for petitioner):

"Q. Is that correct? I would like to show you this air hose Mr. McCauley and ask you to look at that, please, particularly the head of it.

A. Yes, sir.

Q. Now, I believe on this one that you are holding, that the part where I have marked in chalk in both instances here, those grooves have to a large degree been filled in with metal?

A. Yes, sir.

Q. Is that not correct?

A. That is correct.

Q. And other than that it is just the same?

Mr. Ely: It is what?

Mr. Fredrickson: It is just the same as any other air hose coupling.

A. Yes, sir.

Q. Now, you take those, they will couple together, not quite so easily but they come down to where they are coupled together, is that not correct?

A. Yes, sir.

Q. And they are, in all respects they look like any coupling you would have, is that correct?

A. Yes, sir.

Q. And yet they will slide apart?

A. Yes, sir.

Q. In other words, anything, whether it be metal that is in here, ice or anything else, would break your tie that holds your coupler together, would it not?

A. It would prevent it from coupling properly.

Q. It would not prevent it from coupling properly.

A. Well, I mean——

Q. It would cause it to come apart very easily.

Mr. Ely: Do you mean if coupled properly?

Mr. Fredrickson: I beg pardon. He said it would couple properly a moment ago.

Q. (By Mr. Fredrickson) It goes together all right, doesn't it?

A. Well, it goes together all right, yes, but of course that would be considered defective.

Q. Well, that is not what I asked you.

A. If properly coupled, if it was defective.

Q. If there was any ice or anything down in there it will destroy your locking mechanism?

A. Yes, that is it.

Q. Whether it be any foreign substance that is in there.

A. That is correct" (T. 234-236).

Thereafter counsel for respondent cross-examined this witness about this particular locking mechanism. Then on the next day counsel for respondent moved that all of this testimony be stricken and it was ordered stricken by the Court (T. 303).

Upon appeal, the Circuit Court of Appeals affirmed the judgment. Petitioner filed his motion for rehearing which was denied and the mandate of that Court was filed on March 16, 1956.

BASIS OF OPINION OF THE UNITED STATES COURT OF APPEALS.

In the first decision by the Court of Appeals it is noted that there may be evidence of failure to supply the petitioner a safe place to work in that the respondent negli-

gently left these cars in such a state that ice could form on the couplings, and in failing to supply the petitioner with adequate means of removing said ice.

In its instant opinion that same Court said this would not be negligence as petitioner's duty was to remove that ice and to see that the cars were in good repair. The Court in its opinion further says that permitting ice to accumulate would not be the proximate cause of the injury, but would only be an act that would present the opportunity of injury being inflicted.

The Court further ruled that it was not error to strike the testimony concerning the welded coupling. This on the theory that there was no evidence to justify its admission into evidence and that it would not be proper because there was no showing that the coupling in question was in a similar condition to the welded coupling.

REASONS FOR GRANTING THE WRIT.

I.

In deciding that there is no evidence of negligence on the part of the defendant (respondent) the Court of Appeals has disregarded competent evidence and has weighed conflicting evidence and the inferences to be drawn therefrom; in so doing the Court has usurped the function of the jury and brought its opinion into conflict with controlling decisions of this Court in the following cases:

Lavender v. Kurn, 327 U. S. 645;
Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

II.

In deciding that the injury was caused by the sole negligence of the petitioner the Court in its opinion goes on to say that any negligence of respondent, assuming there was ice in the coupler, was not actionable negligence has made negligence of petitioner which the jury could have found to be no more than contributory negligence or total defense in this cause contrary to the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60.

III.

The Court erred in excluding evidence from which it could be inferred that the presence of ice in the locking mechanism of the air hose caused it to burst apart under pressure.

Teal v. Bilby, 123 U. S. 572;
Wilkinson v. Livingston, 45 F. (2d) 465 (8th Cir.).

PRAYER.

Wherefore, your petitioner prays that a writ of Certiorari be issued out of this Court directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send this Court a transcript of the record in the case entitled "Ferriel M. Barnett, Appellant v. Terminal Railroad Association of St. Louis, a Corporation, Appellee, No. 15,413," including the proceedings in the Court of Appeals to the end that the cause may be removed and determined by this Court and the judgment of the Court of Appeals reversed and this cause remanded.

SUMMARY OF ARGUMENT.

I.

In sustaining respondent's motion for a directed verdict where the evidence is conflicting and would support different inferences, the Court of Appeals for the Eighth Circuit has usurped the function of the jury and brings its decision into conflict with controlling decisions of this Court.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916;
Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

II.

The opinion of the Court of Appeals for the Eighth Circuit erroneously injects contributory negligence as a defense in this case contrary to the provisions of the Federal Employers' Liability Act.

45 U. S. C. A., Sections 51 et seq.;
Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 87 L. Ed. 446.

III.

The Court erred in excluding from the case evidence that would tend to establish that ice in the locking mechanism of the air hose would cause it to burst apart under pressure, and this evidence should be considered in determining if the petitioner made a submissible case.

Teal v. Bilby, 323 U. S. 572;
Wilkinson v. Livingston, 45 F. (2d) 464 (8th Cir.).

IV.

The opinion of the Court of Appeals for the Eighth Circuit which is the subject of this petition, is in conflict with that Court's prior opinion on another appeal of this case.

Barnett v. T. & P. R. A., 200 F. 2d 893 (8th Cir.).

ARGUMENT.

I.

In sustaining respondent's motion for a directed verdict where the evidence is conflicting and would support different inferences, the Court of Appeals for the Eighth Circuit has usurped the function of the jury and brings its decision into conflict with controlling decisions of this Court.

There was substantial evidence to support the hypothesis that the respondent was negligent in the manner in which it set cars in its yards in cold weather with the air and steam lines disconnected so that ice formed on the air hose coupling causing it to break apart and to injure the plaintiff. The question of negligence is almost always one of fact. An exception is made if it can be said that the evidence and inferences to be drawn therefrom are such that all reasonable men must agree that there is no negligence. Here the very history of this case cries out more effectively than can any court that all reasonable minds can not agree that the evidence will support only one inference. Two juries of reasonable men disagreed and were discharged.

The rulings of this Court find full expression in the case of Lavender v. Kurn, 327 U. S. 645, 653, where it is said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative

facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard to disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

To a similar effect is the opinion in Wilkerson v. McCarthy, 336 U. S. 53, 61:

"But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances, and a jury should hold a master liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances bearing in mind that the standard of care must be commensurate to the dangers of the business."

It appears in this case that many effective arguments could be made pro and con on the issue of negligence, a jury could have found that considering the hazards to be met and all of the circumstances under which the work was required to be done that the employer was negligent in leaving the lines in question disconnected in violation of its own rule, and especially at a time when the weather caused escaping steam to form ice on the couplings. Petitioner had to try to remove this ice before he could do his work. Ice tends to be transparent. How could he know if he had removed all the ice? The demonstrative evidence which was unsuccessfully offered tends to show that just a little foreign matter in the grooves of the coupling render it dangerous.

The jury could also have found respondent negligent in failing to provide petitioner with adequate tools to meet the situation. He had only a hammer and a hand electric lantern as the means of removing the ice and the means of illuminating his efforts and inspecting the results thereof. Reference has been made in the pleadings and evidence to the tools available for removing the ice, the light available for inspection of the coupling before and after the ice was removed and for inspecting the coupling after it was made. There was a reasonable hypothesis of negligence and that issue is for a jury and not the Court.

II.

The opinion of the Court of Appeals for the Eighth Circuit erroneously injects contributory negligence as a defense in this case contrary to the provisions of the Federal Employers' Liability Act.

The Court of Appeals in its opinion filed says:

> "So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did, that would not be the proximate cause but would simply furnish the opportunity for the infliction of injuries."

That Court then says if there was ice in the coupler, that was because plaintiff did not remove it, and his negligence in failing to do so would be the sole proximate cause of the accident.

We submit that there was substantial evidence from which a jury could infer that ice remained in the coupler, i. e., inside. If it negligently got there, then it was a jury issue as to petitioner's failure to remove it, and even if he were found negligent in this respect, such negligence would be no more than contributory negligence and could

not defeat plaintiff's right to recover under the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 et seq., and this Court's decision in the case of Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54. The Court's theory that petitioner's hypothetical negligence would have been the sole cause of his injury was itself a jury question and not for the Court to decide.

III.

The Court erred in excluding from the case evidence that would tend to establish that ice in the locking mechanism of the air hose would cause it to burst apart under pressure, and this evidence should be considered in determining if the petitioner made a submissible case.

There was much evidence in this cause that a coupler could not be closed with any foreign material therein. Demonstration evidence is recognized and has a very distinct place in the trial of a cause. Counsel for the respondent knew that petitioner's counsel, Mr. Fredrickson, was using a different coupler from the one first introduced in evidence. The second coupler offered had a metal weld to simulate the presence of ice. Respondent cross-examined freely on the second coupler. Then the next day he moves to strike the evidence on the basis that the trial Court could take judicial notice of a fact contrary to that indicated by the demonstration (T. 301, 302; 235-236). The trial Court adopted this paradox and excluded the demonstrative evidence. Not only was this an unjustified application of the doctrine of judicial notice, but it ignored that rule of practice which required respondent's counsel to make his objection to the evidence at the first opportunity. Here, respondent waived his objection. This evidence shows that a coupling may appear secure, but actually will come apart rather easily, i. e., the locking mechanism may be interfered with and not be observable. From this evi-

dence, the jury may infer that ice was in the coupler and interfered with its proper working. We submit the evidence was proper and should not have been stricken and, if improper, any objection to it was waived by defendant.

IV.

The opinion of the Court of Appeals, which is the subject of this petition, is in conflict with that Court's prior opinion in this case reported in 200 F. (2d) 893.

After one mistrial, caused by the failure of the jury to agree, this case was tried a second time and disposed of on a motion for directed verdict sustained at the close of plaintiff's evidence. Plaintiff (petitioner here) appealed and was successful in getting the Court of Appeals for the Eighth Circuit to remand the case for a new trial. The opinion rendered on that occasion will be found in the Appendix hereto, and was reported in 200 F. (2d) 893. The opinion points out several issues of defendant's (respondent's) negligence which appear to inhere in the record (App., p. 33). The cause was then tried a third time on a theory reflected in this petition and encompassed within those pointed out by the Court of Appeals. Nevertheless, upon the failure of the jury to arrive at a verdict, the trial Court again gave judgment for defendant-respondent and now, on the second appeal, the Court of Appeals has sustained the trial Court. The last opinion has not yet been reported. It is set out beginning on page 16 of the Appendix hereto. The two opinions are apparently in conflict. First, it is suggested that, on the record, a certain ground of negligence presents a jury issue; then, after submitting that issue, the Court rules that there is no such issue in the case. The cause has twice been submitted to a jury, but no verdict has ever been returned. Can any reasonable person conclude, then, there is no justiciable issue of fact? We respectfully suggest that the second

opinion of the Court of Appeals is therefore unsound and that it is worthy of this Court's attention because of the conflict with the previous opinion.

CONCLUSION.

Petitioner respectfully submits that, for reasons herein stated and errors illustrated, this Court should grant its writ of certiorari and after hearing reverse this cause and remand it for a new trial.

Respectfully submitted,

FORREST BOECKER,
WAYNE C. SMITH, JR.,
RAYMOND FORDER BUCKLEY,
110 South Central,
Clayton 5, Missouri,
Attorneys for Petitioner.

MAY 1 19
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1955.

No. 914

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Amended Complaint	1
Answer	3
Abstract of Testimony	5
Order of Court	15
Notice of Appeal	15
Opinion of Court of Appeals	16
Opinion of Court of Appeals on Prior Appeal	27
Petition for Rehearing	35